Office-Supreme Court, U.S.
FILED
SEP 22 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 432

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents,

AMERICAN EXPORT LINES, *et al.*,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

HERBERT BURSTEIN,
160 Broadway,
New York, N. Y.,
Counsel for Petitioner.

LODER APPEAL PRESS, INC., 41 VESEY STREET WOrth 2-0689

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
(A) The Parties	3
(B) The New York-New Jersey Port and Its Economic Role	3
(C) The Waterfront Commission Compact	4
(D) The Approved Agreement	5
Reasons for Granting the Writ	6
Conclusion	15
Appendix A	16
Appendix B	18

CASES CITED

Ex-Parte Collett, 337 U. S. 55 (1949)	13
Federal Maritime Board v. Isbrandtsen Company, 356 U. S. 481 (1958)	14

PAGE

Isbrandtsen v. United States, 93 App. D. C. 293, 211 F. 2d 51 (1954) cert. den. sub. nom. Japan-Atlantic & Gulf Freight Conference v. United States, 347 U. S. 990, 74 S. Ct. 852 (1954)..10, 11, 12, 15

Isbrandtsen-Moller Co. v. United States, 300 U. S. 139 (1937) 10

Jay v. Boyd, 351 U. S. 345 (1956) 13

Pennsylvania Motor Truck Association, et al. v. Port of Philadelphia Marine Terminal Association, et al., 183 F. Supp. 910 (D. C. E. D., Pa. 1960) 15

United Gas Pipe Line Company v. Mobile Gas Service Corporation, etc., 350 U. S. 332 (1956)..7, 8, 9, 12

United States v. Borden Co., 308 U. S. 188 (1939) 14

STATUTES CITED

Section 15 of the Shipping Act of 1916 (39 Stat. 732, 46 U. S. C. Section 814) 2, 6, 8, 9, 11, 12

New York-New Jersey Waterfront Commission Compact 4, 5

67 Stat. 541 4

Section 4 of the Natural Gas Act (52 Stat. 821, 15 U. S. C. §§717, 717c) 7

Section 5 of the Natural Gas Act 9

Section 2(c) of the Administrative Act (5 U. S. C. §1001(c) 13

AUTHORITIES CITED

PAGE

Foreign Trade at The Port of New York 1961, pp. 5, 21 4

McKinney's "The Consolidated Laws of New York", Volume 65, Section 6700gg 4

Antitrust Subcommittee of The Committee on the Judiciary House of Representatives (86th Cong., 1st Sess., Part I, Volume I, page 175 15

Special Subcommittee on Steamship Conferences of The Committee on Merchant Marine and Fisheries House of Representatives (86th Cong., 1st Sess., Part 3, page 1803) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,
Respondents,

AMERICAN EXPORT LINES, *et al.*,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The petitioner, Empire State Highway Transportation Association, Inc. (herein called "Empire") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above entitled cause on April 27, 1961.

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia, printed in Appendix B hereto, pages 18-29, *infra*, is reported at 291 F. 2d 336. The order of the Federal Maritime Board (herein called the "Board"), which was the subject of review in the Court below, is printed in Appendix B hereto, pages 30-31, *infra*.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 27, 1961. By order of this Court, dated July 25th, 1961, September 22, 1961, was fixed as the date within which to file this petition for a writ of certiorari. The jurisdiction of this Court is invoked under 5 U. S. C. Section 1040.

Question Presented

Where the Board approves an agreement under Section 15 of the Shipping Act of 1916, as amended (39 Stat. 733, 46 U. S. C. Section 814, herein called the "Act"), which purports to authorize the promulgation of rates and charges, rules, regulations and practices governing services and activities, subject to the Act and within the jurisdiction of the Board, and thereafter the parties to the approved agreement publish a tariff which unilaterally fixes rates and charges and imposes rules, regulations and practices for such services and activities, does such a tariff constitute a new agreement or a modification of an existing agreement which requires approval by the Board, under Section 15 of the Shipping Act of 1916, as amended, before it may be lawfully applied and enforced; or assuming that it is not a new agreement or modification of an existing agreement, is the Board required to accept the tariff and permit it to go into effect without prior review or approval?

Statutes Involved

The statutory provision involved is Section 15 of the Shipping Act of 1916, as amended (39 Stat. 733, 46 U. S. C. Section 814), and is set forth in Appendix A, pages 16-17, *infra*.

Statement

Because this case concerns significant economic, as well as legal, issues a brief description of the parties and a summary review of relevant economic and legislative data is submitted as an aid to this Court.

(A) The Parties:

Petitioner Empire is a trade association whose members are motor carriers engaged in the transportation of waterborne freight moving in foreign commerce, from and to piers, docks and waterfront terminals in the Port of New York-New Jersey (herein called the "Port"). Empire's members engage the services of so-called terminal operators, steamship companies and stevedores, namely, the respondents in the proceedings before the Board and intervenors in the Court below (herein called the "Intervenors") for loading or unloading such cargo onto and from their trucks.

(B) The New York-New Jersey Port and Its Economic Role:

The Port is the most important American center of foreign and intercoastal trade. Its waterfront has over 700 miles of shoreline and more than 900 piers, wharves and quays, including 300 deep sea piers. Approximately 125 piers, used for the handling of import and export freight, are operated by the Intervenors.

Substantially all of the cargo which enters or leaves the Port by ship originates at, or is destined to points outside the State of New York, *i.e.*, in other States or foreign countries.

In 1960, 13,736,545 tons of general cargo traffic of the value of $9.7 billion moved over the piers of the Port but,

as the Port of New York Authority noted, the Port's "competitive share of United States general cargo declined * * * *" and there has been a "continuing erosion of its competitive position". *Foreign Trade at The Port of New York 1961*, pp. 5, 21 (published by The Port of New York Authority).

Although official statistics are lacking, it is estimated that 70% of all import and export traffic moves to or from the piers on trucks.

(C) The Waterfront Commission Compact:

Prior to World War I, truckmen dispatched their horse drawn wagons or their motor vehicles to the piers of New York and the employees of the truckmen loaded or unloaded the freight alone or with the aid of casual workers who frequented the piers. As the volume and frequency of import traffic to and from the piers increased, a group of persons known as "public loaders" began to regularly perform the function of loading trucks and later on, with the increase of export tonnage, some public loaders began to unload trucks.

The public loader system generated a number of abuses. As a result of many complaints concerning this system, there were a number of investigations by the Congress of the United States, the City of New York and the State of New York. Following these investigations and in June, 1953, the Legislatures of the State of New York and New Jersey, with subsequent concurrence and approval of the Congress of the United States (67 Stat. 541), enacted a statute known as the "New York-New Jersey Waterfront Commission Compact" (herein called the "Waterfront Commission Act") which, among other things, outlawed and prohibited public loading and the public loader system. McKinney's, "The Consolidated Laws of New York", Volume 65, Section 6700gg.

The Waterfront Commission Act authorized five classes of persons to perform services previously provided by public loaders. Included in the five classes are truckmen and the Intervenors. However, the loading and unloading by individual truckmen proved impracticable for a number of reasons not relevant here. As a result, shortly after the effective date of the Waterfront Commission Act, water carriers in the Port of New York undertook to provide, directly or through independent stevedoring companies in most cases, the services previously performed by public loaders. In practical effect, the Intervenors obtained a monopoly of truck loading at the Port.

On August 24th, 1954, a group of water carriers and stevedores, including Intervenors, entered into an Agreement which purported to authorize the establishment of uniform charges for loading and unloading of oceanborne freight onto and from trucks at piers or other waterfront terminals at the Port. This Agreement, which was filed by the contracting parties with the Board and assigned No. 8005, was approved by the Board on March 23, 1955. A subsequent amendment, designated as Agreement No. 8005-1 was also approved by the Board. The amendment, briefly described, purported to vest exclusive rights over truck unloading in the Intervenors.

(D) The Approved Agreement:

Neither the Agreement (nor the later amendment) contained any rates, charges, rules and regulations, but merely stated that Intervenors "* * * shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices * * *."

Relying upon the Agreement, Intervenors issued Tariffs Nos. 1, 2, 3 and 4 which set forth the rates, charges,

rules and regulations for the loading and unloading services to be rendered by Intervenors.

A challenge to Tariffs Nos. 3 and 4 was rejected, except in minor respects, by the Board on February 24, 1959. Again, purporting to act pursuant to the Agreement, and without obtaining the approval of the Board, the Intervenors issued Tariff No. 5 on January 15, 1960, which became effective February 15, 1960. Petitioner then filed a complaint with the Board charging various violations of the Act. In order to present the basic question involved here, the complaint was amended to allege only that Tariff No. 5 constituted an agreement or a modification of the Agreement within the meaning of Section 15 of the Act and, hence, could not become effective without the prior approval of the Board. Thereupon, the Intervenors filed a motion to dismiss the complaint and Petitioner replied thereto. By order dated May 18, 1960, the Board granted Intervenors' motion and dismissed the amended complaint. Petitioner then filed a petition for review of the order of the Board with the Court of Appeals. Notwithstanding an acknowledgment that Tariff No. 5 was an agreement within the meaning of Section 15 and required prior Board approval, the Court of Appeals affirmed the Board's order.

Reasons for Granting the Writ

1. The question presented is important in the administration of the Shipping Act of 1916, as amended. Directly involved are important and novel issues concerning the meaning and purpose of Section 15 of the Act, the legitimate scope of economic regulation by the Board under the Act and the jurisdiction and powers of the Board thereunder, all of which have not been resolved by this Honorable Court. The relationship between and

among the Board, the persons subject to its jurisdiction and the public are vitally affected by this proceeding.

2. This case involves the important volume of ocean-borne traffic which moves by truck. Since March, 1955, the charges assessed under the tariffs have been increased. It has been charged that the persistent rise in costs of handling oceanborne traffic has diverted foreign trade to ports other than the Port, endangers the investments of thousands of truckmen and the jobs of tens of thousands of trucking employees, impairs the economic stability of the vast multitude of businessmen and workers who depend upon the commerce which moves through the Port for their day-to-day living and for their future security and accounts, in part at least, for the secular decline in the Port's status in world commerce.

3. The Court below has either overlooked or misread the principles enunciated by this Court in *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, et al., 350 U. S. 332 (1956) which involved Section 4 of the Natural Gas Act (52 Stat. 821, 823, 15 U. S. C. 717, 717c).

In that case, this Honorable Court rejected a contention advanced by the Federal Power Commission that rate changes filed by a natural gas company must become effective without a hearing or advance approval by the Commission; that consistent administrative practice by the Commission required the acceptance of the filed charges; and that the sole remedy of an aggrieved party was to pay the new rate, and to await the outcome of a subsequent hearing as to the reasonableness of the increase (unless, of course, the new rate was suspended during the pendency of the hearing).

The lesson of *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, *supra*, should have been the touchstone of the decision in the case at bar. Here the Intervenors filed an Agreement which set forth no rates, charges, rules or regulations but which provided that the Intervenors would "establish, publish and maintain tariffs containing just and reasonable rates, changes, classifications, rules, regulations and practices with respect to" the services of loading and unloading trucks and that "all published tariffs of rates, charges, classifications, and all rules and regulations covering their application, and additions thereto and all changes therein, applicable to loading or unloading * * * shall be promptly furnished to" the Board. The Intervenors then proceeded to publish tariffs which not only constructed a comprehensive scheme of rates, charges, rules, regulations and practices, not incorporated in the approved Agreement, but accomplished numerous changes, including increases in rates and charges. The Board determined that it had no power to suspend, approve or disapprove the tariffs and, hence, the tariffs had to be permitted to go into effect without Board action. The Board and the Court below held, in substance, that the sole remedy was a subsequent proceeding under Section 17 and, possibly Section 22 of the Act (App. B, p. 25).

In *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, *supra*, a natural gas company proceeded to unilaterally alter the rates established by agreement with a distributor. The Federal Power Commission disclaimed power or authority to reject the new contract rates and, like the Board in this case, referred to other sections of the Natural Gas Act as sources for relief against new rates. Simply stated, then, the Board, in the case at bar, and the Federal Power Commission, in *United Gas Pipe Line Company* v. *Mobile Gas Service Cor-*

poration, supra, held that all that was required under the statute was a filing of the new rates, whereupon they become effective automatically. This is plainly erroneous:

> "In short, the Act provides no 'procedure' either for making or changing rates; it provides only for notice to the Commission of the rates established by natural gas companies and for review by the Commission of those rates."
>
> • • • • •
>
> "• • • there is nothing in the structure or purpose of the Act from which we can infer the right, not otherwise possessed and nowhere expressly given by the Act, of natural gas companies unilaterally to change their contracts" (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation, supra*, pp. 343 344).

In short, the fact that the Federal Power Commission could exercise its powers under Section 5(a) of the Natural Gas Act to set aside or modify a rate which it found "unjust, unreasonable, unduly discriminatory, or preferential" did not mean that unilateral contract changes must be permitted to go into effect and that the Federal Power Commission could not reject or suspend the new contract rates. Precisely the same error was committed by the Court below in this case when it relied upon Sections 17 and 15 of the Shipping Act (which permits the withdrawal of approval of an agreement if a rate is found unreasonably high) (App. B, p. 25), as a basis for holding that unilateral rate changes effected by new tariffs must become effective without prior Board approval. Assuming, *arguendo*, that a new tariff is not an agreement but an integral part of the basic approved agreement, then changes in the tariff constitute, at the very least, changes in the terms of the approved Agreement and these uni

lateral contract rate changes can no more become automatically effective than a change in a contract rate for natural gas supplied to distributors. Indeed, in *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 143 (1937), this Court said:

> "the act requires that if any contract for a change of those rates is made, the new rates may be charged only after the Board has approved the agreement."

4. The decision by the Court below is in conflict with the decision of another panel of that Court which decided *Isbrandtsen Co.* v. *United States*, 93 App. D. C. 293, 211 F. 2d 51 (1954), cert. den. sub nom. *Japan-Atlantic & Gulf Freight Conference* v. *United States*, 347 U. S. 990, 74 S. Ct. 852 (1954) (hereinafter called the "*Isbrandtsen case*").

Petitioner's contentions, are essentially, two-fold: first, even if a basic conference agreement authorizes the establishment of rates and charges, the promulgation of a complete tariff, setting forth the actual rates, charges, rules and regulations constitutes a new agreement or a modification of an existing agreement and, therefore requires prior Board approval. This is not a "routine" matter which the Board has held does not require prior approval.

Precisely the same question was presented in the *Isbrandtsen case* where the basic conference agreement authorized the establishment of dual rates but did not set forth the actual rates. The Court of Appeals held that the establishment of the dual rates was not an "interstitial sort of adjustment" but was either a new agreement or a modification of an existing agreement which required prior Board approval. The Court then rejected the Board's argument (identical with the one advanced in

the instant case) that publication of dual rates was routine and had always been so considered by the Board. The mere fact that dual rates were authorized by the basic agreement did not constitute a protective umbrella for any and all dual rates thereafter published. On the contrary, all such rates did require the approval of the Board.

Agreement 8005 which the Board originally approved provided that the contracting parties would, in the future, "establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices."

This Agreement, like the one in the *Ishmaltsen case*, does not contain the actual rates and charges for this service nor does it set forth any of the rules, regulations and practices. In effect, therefore, it is merely an agreement among the Intervenors to publish and observe uniform rates, charges, practices and rules to be established in the future and to file all such tariffs with the Board. An examination of Tariff No. 5, which Intervenors published, shows that it not only sets forth an extensive and complex schedule of rates and charges, but defines the nature of the Intervenors' obligations, adopts rules with respect to their liability, describes the conditions under which other persons might load and unload trucks and generally sets forth the manner and method by which trucks will be loaded or unloaded or service refused. If the *Ishmaltsen case* means anything, it teaches that such a tariff must be approved by the Board before it becomes effective, because it is a new agreement or a modification of the basic Agreement.

The Shipping Act does not provide a procedure for establishing or changing loading or unloading rates. But this does not prove, as the Court below found, that publishing comprehensive tariffs and making subsequent

changes in rates, charges and practices could be automatically accomplished (*United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, *supra*).

5. The Court below acknowledged that Tariff No. 5 did constitute an agreement within the meaning of Section 15. However, departing from the decision in the *Isbrandtsen case*, the Court turned to questionable doctrines of statutory construction to overcome the plain meaning and purpose of the statute. Section 15, by its very terms, makes clear that the Intervenors could not have been authorized to publish tariffs which became automatically effective as "routine" matters. Thus, Section 15, *inter alia*, requires the filing of "every agreement * * * fixing or regulating transportation rates or fares". If by liberal construction, the tariffs be deemed to prescribe "transportation rates" then, obviously, the approved Agreement did no such thing. If the Agreement provides for a "cooperative working arrangement", which it concededly does, it describes only a method for formulating rates and charges and requires filing. But mere filing does not connote automatic approval. The fact is that Section 15 of the Act does not contemplate the approval of agreements which confer a right upon private parties to fix rates, charges and practices in the future by unilateral and self-executing action. To put it simply, if the Intervenors had filed a tariff instead of the Agreement this would have been an "agreement" as defined by the Act. If the tariff was then modified or altered or portions cancelled, Section 15 would clearly require Board action. Assuming then that the basic Agreement was filed together with the first tariff and the basic Agreement and first tariff were deemed to be the "Agreement," then, clearly, Tariff 5 being a new schedule of rates and charges would be a modification which required prior Board approval.

These conclusions are compelled by the language of Section 15 of the Act and the logic of the entire statute.

This Court has consistently defined the judicial function to be the enforcement of a statute according to its terms and to be guided by its plain meaning. *Jay* v. *Boyd*, 351 U. S. 345 (1956). In the complex field of statutory construction, there is no canon more reliable than the one which instructs that when the language is clear and unambiguous, it means what it plainly says. *Ex-Parte Collett*, 337 U. S. 55 (1949). In the instant case, when the Court below held that Tariff No. 5 was an agreement, further construction was mere sciamachy.

The rationale for the decision below was equally untenable. The Court was apprehensive that a requirement for Board approval could make the "present statute unworkable" and "approval would require notice to interested parties and a hearing with substantial and often protracted delays * * *" (Appendix B, p. 25). This, however, was palpably wrong. Petitioner did not suggest the need for extended hearings preliminary to the approval of each tariff. It is elementary that rate-making is rule-making under Section 2(c) of the Administrative Procedure Act (5 U. S. C. 1001 (c)) and which does not require a hearing (in the absence of an express requirement for a hearing in the governing statute).

Notice of filing is required, but the Board could approve without a hearing and such a procedure would not be "merely formal" and become "of little significance" (App. B, p. 25). Section 15 prescribes legislative standards for approval and the Board could, in the case of tariffs such as Tariff No. 5, as it did with conference agreements, promulgate rules, regulations and requirements which would implement the statutory mandate (cf. 46 C. F. R. 236).

The Board cannot abdicate its power to approve or disapprove an agreement to private parties and approval cannot be merely formal. Indeed, if Section 17 (barring illusory reparation proceedings under Section 22 of the Act) provide the sole remedies available to private parties, rates and practices can be established which would destroy commerce until the Board elected to act. No such intent is discernible in the statute or the legislative history.

Statutes which grant immunity from anti-trust laws must be strictly construed and the superintendence of the agency administering the exculpatory Act must be encouraged (*United States* v. *Borden Co.*, 308 U. S. 188 (1939)). The Intervenors who have an actual monopoly of truck loading and unloading at the piers, are not only granted immunity from the anti-trust laws by the Section 15 approval of their agreement, but the Board and the Court below now hold that this limited immunity sanctions price-fixing at any time, at any levels, with or without justification.

Reliance by the Board and the Court below on the so-called legislative history was misplaced. It is true that the Board has repeatedly held in cases, similar to the one at bar, that the issuance of a tariff is a routine matter. But the same argument was advanced by the Board when dual rates were established pursuant to a conference agreement authorizing the same. Despite the Board's long administrative practice, to the contrary notwithstanding, the Court of Appeals in the *Isbrandtsen case* held that the promulgation of dual rates required prior Board approval.

This Court, in *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U. S. 481 (1958) held that the Board departed from the plain meaning of Section 15. Indeed, in the brief filed with this Court by the Board in that case, so-called legislative history was relied upon to sustain an

administrative practice and construction of ancient vintage which this Court rejected.

At a hearing before the *Antitrust Subcommittee of The Committee on the Judiciary House of Representatives* (86th Cong., 1st Sess., Part I, Volume I, page 175), and a hearing before the *Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries House of Representatives* (86th Cong., 1st Sess., Part 3, page 1803), former Chairman Morse of the Board acknowledged that clarifying legislation was needed so that even so-called routine matters would not require approval under Section 15.

In short, the legislative history is not so clear, compelling and exigent as to justify disregard for the plain meaning of Section 15. The construction by the Board given to Section 15 is entitled to no weight since it is clearly contrary to the express language of the statute and except for the decision below, to other and better judicial precedents (*Isbrandtsen case; Pennsylvania Motor Truck Association, et al. v. Port of Philadelphia Marine Terminal Association, et al.*, 183 F. Supp. 910 (D. C. E. D., Pa. 1960)).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: September 21, 1961.

Respectfully submitted.

HERBERT BURSTEIN,
Counsel for Petitioner.

Appendix A

Section 15 of the Shipping Act, as amended, (46 U. S. C. Section 814):

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.
>
> "The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this

chapter, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

"All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification or cancellation lawful under this section shall be excepted from the provisions of section 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15840

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC., PETITIONER

v.

FEDERAL MARITIME BOARD AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN EXPORT LINES, ET AL., INTERVENORS

On Petition for Review of an Order of the Federal Maritime Board

---

Decided April 27, 1961

Mr. Herbert Burstein, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. John A. Kendrick* was on the brief, for petitioner.

Mr. Frank Gormley, Attorney, Federal Maritime Board, of the bar of the United States District Court for the District of Columbia, *pro hac vice*, by special leave of

court, with whom *Messrs. James L. Pimper*, General Counsel, Federal Maritime Board, *Robert E. Mitchell*, Assistant General Counsel, Division of Litigations, Federal Maritime Board, *Edward Aptaker*, Assistant General Counsel, Division of Regulations, Federal Maritime Board, and *Richard A. Solomon*, Attorney, Department of Justice, were on the brief for respondents.

Mr. Mark P. Schlefer, with whom *Mr. T. S. L. Perlman* was on the brief, for intervenors.

Before FAHY, DANAHER and BASTIAN, *Circuit Judges*.

FAHY, *Circuit Judge*: Petitioner is an association of motor carriers engaged in the transportation of freight moving in foreign commerce from and to piers, docks and waterfront terminals in the Port of Greater New York. The carriers engage the services of various terminal operators, steamship companies and stevedores. These include the intervenors, who operate ocean terminal facilities in the Port. They load or unload the cargo carried by the trucks of the motor carriers and destined for export or being imported by water.

Intervenors have formed a "conference" which is authorized to function under an agreement, referred to as the basic or conference agreement. This agreement is identified as FMB Agreement No. 8005, and was approved by the respondent Board March 23, 1955, under section 15 of the Shipping Act of 1916, set forth in the margin.[1] It

---

[1] § 15, 39 Stat. 733 (1916) as amended, 46 U.S.C. § 814 (1958) provides:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other persons subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in

is seen from the terms of section 15 that action taken in concert by members of a conference under an approved section 15 agreement is immunized from the operation of

---

part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board, shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

the antitrust laws, but that it is unlawful to carry out in whole or in part, directly or indirectly, any agreement, modification or cancellation thereof prior to approval by the Board.

The conference agreement grants the following authority to the parties to it:

> 1. That they shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to such services—the first such tariff to be established by the unanimous agreement of the parties hereto. The approval of not less than two-thirds of the parties represented at a meeting shall be required for any change, in addition to or deletion from said tariffs, issued as supplements thereto or as re-issues thereof.
>
> 2. That they shall assess and collect rates and charges for and in connection with such services strictly in accordance with rates, charges, classifications, rules, regulations and practices set forth in said tariffs and, further, shall not in any respect whatsoever deviate from or violate any of the terms or conditions or provisions of said tariffs, and no rates or charges assessed or collected pursuant to such tariffs shall be directly or indirectly refunded or remitted in whole or in part in any manner or by any device.

On January 15, 1959, the conference filed Tariff No. 5 with the Board, increasing the rates charged by its members to the members of petitioner some 15 per cent, effective February 15, 1960. The tariff also contains certain changes in regulations and practices affecting the business

done by intervenors with petitioner's members.[2] The tariff was filed with the Board but was put into effect without Board approval. Intervenors considered the tariff not to be a section 15 agreement or modification which required approval in addition to the approval previously given the basic agreement itself.

Petitioner filed a complaint with the Board challenging the validity of Tariff No. 5 because of the absence of specific Board approval. On motion of intervenors, respondents before the Board, the complaint was dismissed, the order reciting,

> The Board and its predecessors consistently have held that the issuance and modification of tariffs pursuant to an approved basic agreement are not new agreements, or modifications of agreements, requiring prior section 15 approval. See *Empire State H'W'Y Transp. Ass'n.* v. *American Export Lines*, 5 F.M.B. 565, 585, 586 (1959).[3]

Petitioner here seeks review of this order of the Board, the question being whether Tariff No. 5 requires Board approval under section 15.

In a literal sense the tariff is an agreement as to rates reached in concert by members of the conference. Section 15 in terms requires approval, in order to be lawful, of every agreement "fixing or regulating transportation rates or fares"; and we take it that the fixing and regulation of charges for services furnished by intervenors to members of petitioner are "transportation rates or fares."

---

[2] We do not separately consider the regulations and practices, for if, as we hold, the rate increase is valid the same reasoning carries with it the validity of these particular regulations and practices.

[3] *Empire State Highway Transp. Ass'n* v. *American Export Lines, Inc.*, No. 894, FMB, May 18, 1960.

Nevertheless, the problem is not solved by a literal reading of some of the language of section 15. It must be solved by considering this language with other provisions of the statute in the light of a long legislative and administrative history.

Since 1927 the Board[4] has construed the expression "every agreement" in section 15 as not to include "routine operations relating to current rate changes and other day-to-day transactions." *Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). And "routine operations" has consistently been interpreted by the Board to include conventional rate changes. In 1959 in the proceedings of *Empire State Highway Transp. Ass'n* v. *American Export Lines, Inc.*, 5 F.M.B. 565 (1959), involving intervenors' earlier Tariffs Nos. 3 and 4, the Board said, at page 585:

> We agree with the examiner and find that the tariffs are not modifications of the basic agreement or new agreements, within the meaning of section 15. The issuance of tariffs, including rates, charges, rules, and regulations covering the application of the tariffs, were authorized and contemplated by the approved basic agreement.
>
> The Board and its predecessors have uniformly held since *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927), that the issuance of tariffs, including rules and regulations covering their application, have been routine matters authorized by an approved basic conference agreement, not requiring separate approval under section 15.

We think this is a reasonable construction of the terms of the basic agreement which authorize the conference to

---

[4] We use the word "Board" as including also the Board's predecessors.

"establish * * * tariffs containing just and reasonable rates * * * regulations and practices."[5]

Thousands of rate changes have been agreed upon in concert by conference members in the maritime and related industries under the authority of approved conference agreements, and we are cited to no instance in which conventional rate changes have been held by Board or court to be unlawful because unaccompanied by prior Board approval. This long administrative practice is unusually impressive; and we do not believe that the Supreme Court intended to change its course by the statement in *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 146 (1937), in passing upon a different question, that "the act requires that if any contract for a change of those rates is made the new rates may be charged only after the board has approved the agreement." We think this reference to the language in section 15 was not intended as a construction of the provision in its application to such a case as the present, though our own case of *Isbrandtsen Co.* v. *United States*, 93 U.S. App. D.C. 293, 211 F. 2d 51, *cert. denied*, 347 U.S. 990, demonstrates that a conference agreement is not a canopy under which to inaugurate without prior Board approval a dual contract system of charges or rates. As the Board argues, "A tariff change and modification of the basic agreement may sometimes be a matter of degree."

---

[5] Petitioner does not challenge the reasonableness or propriety of the rates and regulations contained in Tariff No. 5 itself, only their lawfulness as not having been approved under section 15 as a subject agreement or modification of an agreement.

It is to be remembered also that the rates are subject to Section 17 of the Shipping Act requiring the observance of just and reasonable regulations and practices and, additionally, that when a conference has engaged in conduct violative of the fair and reasonable standards of the Act the Board may withdraw approval of the basic agreement itself, or require its modification.[7]

We would require clearer expression of its purpose to attribute to Congress, in light of the history of this problem, an intention to require every rate increase made through the procedures of an approved basic agreement to be approved by the Board in advance of effectiveness. This would make the present tariffs unworkable, unless approval were to be merely formal; for unless merely formal, the process of litigation, approval would require notice to interested parties and a hearing with [illegible] and other protracted delays incident to administrative decision and judicial review. We know of no [illegible] that Congress intended a result so departure from

Moreover, when we consider the manner in which Congress has approached the problems of domestic water traffic under the Act, compared with the provisions applicable to intervenors, the view we adopt gains further support. Domestic carriers are required to adhere to filed rates and to give thirty days notice of changes; and the Board may suspend rates for not to exceed four months and fix maximum rates.[9] These provisions came into effect in 1933 when Congress was aware of the administrative interpretation under which foreign rates established under conference agreements were not required to have section 15 approval. See H.R. Rep. No. 2006, 72d Cong. 2d Sess. 4 (1933). To interpret section 15 to require such approval for foreign rates would attribute to Congress an intention to exercise more stringent controls over foreign than over domestic rates; for such an interpretation would mean indefinite suspension of foreign rate changes.[10] Yet nothing indicates Congress intended rate changes for foreign traffic to be more difficult than changes applicable to domestic trade. And the terminal operators whose rates are here questioned by petitioner are under the same regulations

---

of time, at the expiration of which the rates become effective whether or not approved. Rates which become effective in such manner, however, may be the subject of re-calculation or disapproval upon the later termination of hearings to determine the lawfulness of such rates. See, e.g., Inter-state Commerce Act §§ 6, 15(7), 24 Stat. 380 (1887), 44 Stat. 1447 (1927), as amended, 49 U.S.C. §§ 6(1), 6(3), 15(7) (1958); Motor Carrier Act §§ 216(a), (g), 217(c) (1935), as amended, 49 U.S.C. §§ 316(a), (g), 317(c) (1958); Natural Gas Act § 4, 52 Stat. 822 (1938), 15 U.S.C. § 717c (1958); Federal Aviation Act §§ 403(a), (c), 1002(g), 72 Stat. 758-59, 799, 49 U.S.C. §§ 1373 (a), (c), 1482(g) (1960).

[9] Intercoastal Shipping Act § 2, 47 Stat. 1425 (1933), 46 U.S.C. § 844 (1958).

[10] The established practice of filing rate tariffs agreed to under conference procedures, for information, is not to be confused with filing for prior approval.

insofar as rates are concerned as are those engaged in foreign trade.

Approval of an administrative interpretation is not lightly to be laid at the door of Congress; but the evidence of awareness by Congress of the Board's interpretation over a very considerable period, during which Congress considered the legislation several times with no change in section 15 as administratively interpreted cannot be altogether ignored.[11] When the Shipping Act was before the House Committee of the Merchant Marine and Fisheries the distinction between the method by which rates were regulated under the Interstate Commerce Act and the method proposed in the Shipping Act was pointed out by one of the draftsmen of the latter, who stated that the carriers would work out their own rates without being obliged to file them with the Government unless they were joint interline rates of two connecting carriers.[12] The distinction between this and the provisions of the Interstate Commerce Act was adverted to.[13] And the testimony indicates that the distinction held as to conference rates as well as to those of an individual carrier.

The long practice of the Board, beginning no later than 1927, of permitting tariffs to be filed for information and to become effective without approval has been set forth in reports to Congress, including the report of *Section 15 Inquiry, supra*, preceding the enactment of the Merchant

---

[11] *See Service* v. *Dulles*, 354 U.S. 363, 380; *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549-50; *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366; *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 313.

[12] Hearings on Regulatory Features of Shipping Bill Before the House Committee on the Merchant Marine and Fisheries, 64th Cong. 1st Sess. 17 (1916) (testimony of Dr. Emory R. Johnson)

[13] Id. at 35.

Marine Act of 1928.[14] Moreover, the *Section 19 Investigation* of 1935, 1 U.S.S.B.B. 470, was brought to the attention of Congress in the Board's annual report for 1935 and 1936[15] when Congress was revising the Shipping Act of 1916 and transforming it into the Merchant Marine Act of 1936.[16] Finally, in the wake of *Isbrandtsen Co. v. United States*, 356 U.S. 481 (1958), Congress moved to preserve the status quo as far as dual rate arrangements affected by that decision were concerned.[17] In 1959 the Board again reported its practice with respect to tariffs filed pursuant to section 15 agreements. The Chairman of the Board testified:

> The regulation of water carriers in the foreign trade of the United States is substantially different from the regulation of carriers in our domestic trades. The Board has been given no direct control over the reasonableness of rates in the foreign trade. It may not prescribe either maximum or minimum rates in these trades; in fact, it has little to say as to the measure of the rates of common carriers by water serving our foreign trade. There is no requirement for the advance filing of freight rates in the foreign trade, nor any authority to suspend these rates. However, by its General Order 83, the Board requires common carriers by water in the foreign trade to file their export rates within a period of 30 days after they have become effective and it requires a similar filing of all rates established by common carriers by water pursuant

---

[14] 45 Stat. 690 (1928), 46 U.S.C. § 891 (1958).

[15] Report of the United States Maritime Commission 16 (1936).

[16] 49 Stat. 1985 (1936), 46 U.S.C. § 1101 (1958).

[17] Act of June 29, 1960, P.L. 86-542, 74 Stat. 253; Act of August 12, 1958, P.L. 85-626, 72 Stat. 574.

> to any agreement subject to the Board's jurisdiction. . . .
>
> There are 125 steamship conferences covering the various freight trades of the United States. The minutes and records of their meetings, and their rates and practices, are filed with the Board and are examined so far as staff limitations permit to ascertain whether actions taken are within the authority of their approved agreements and are not contrary to provisions of law or decisions of the Board or the courts.[18]

A description by the Board of its section 15 practices was also given to the House Antitrust Subcommittee in 1959. The Board then recommended that "All conferences and nonconference [sic] berth services should be required to file their rates with the Federal Maritime Board 90 days in advance of their effective date," and that the rates duly filed should be the only rates charged.[19] This recommendation has not been enacted into law. The extension by Congress of the "status quo" legislation above referred to was on the background of this information that currently there was no requirement that conference rates receive section 15 approval before becoming effective. If a different position is now to be adopted we think it should be at the hands of Congress rather than required by the courts.

Affirmed

---

[18] Hearings Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries, 86th Cong., 1st Sess. 3-4 (1959).

[19] Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess. 172-173 (1959).

ORDER

At a Session of the Federal Maritime Board, held at its office in Washington, D. C. on the 18th day of May, A. D. 1960.

DOCKET NO. 894

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC. and NEW JERSEY MOTOR TRUCK ASSOCIATION, INC.,

v.

AMERICAN EXPORT LINES, INC., *et al.*

On January 15, 1960, respondents, pursuant to approved agreement 8005, issued and filed with the Board Tariff No. 5 to become effective February 15, 1960.

By amended complaint dated March 2, 1960, complainants allege that Tariff No. 5 is a new agreement, or modification of an agreement, unapproved under Section 15 of the Shipping Act, 1916, and request that the Board suspend the operation of the tariff and require respondents to submit the tariff for approval as a section 15 agreement.

On March 22, 1960, respondents filed a motion to dismiss the complaint on the grounds, among others, that the complaint fails to state a cause of action upon which relief can be granted. Respondents filed a reply to the motion dated March 31, 1960.

The Board and its predecessors consistently have held that the issuance and modification of tariffs pursuant to an approved basic agreement are not new agreements, or

modifications of agreements, requiring prior section 15 approval. See *Empire State HWY Transpn. Ass'n. v. American Export Lines*, 5 F.M.B. 565, 585, 586 (1959).

It is ORDERED, that the amended complaint herein be, and it is hereby, dismissed.

By the Board.

s s JAMES L. PIMPER
Secretary

(SEAL)

O